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SUPREME COURT, U.S.

No. 82-5001

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

WILLIAM ALVIN SMITH,

Petitioner

-against-

STATE OF GEORGIA

Respondent.

ON PETITION FOR A WRIT
OF CERTIORARI TO THE SUPREME
COURT OF GEORGIA

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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ARGUMENT

THIS COURT HAS JURISDICTION TO GRANT THE PETITION FOR A WRIT OF CERTIORARI, BECAUSE THE FEDERAL QUESTION PRESENTED WAS RAISED AND DECIDED BY THE COURTS BELOW

At the outset of petitioner's trial, the trial court excluded a prospective juror because of his conscientious opposition to capital punishment. The trial court -- takenly believed that it was bound to do so by thi[illegible]t's decision in Witherspoon v. Illinois, 391 U.S. 510 (1968). App. 15a-16a.[1/] While the "death-qualification" of petitioner's jury was inconsistent with the s[illegible]rinciples of law enunciated in Adams v. Texas, 448 U.S. 38 (1980), its constitutionality is still an unresolved issue.

Without denying that the petition in this case presents a federal question of fundamental importance, the State opposes on jurisdictional grounds the granting of a writ of certiorari in this case. The State argues that the constitutionality of the juror exclusion in this case was not raised and decided in the courts below, and that therefore under 28 U.S.C. §1257(3) this Court lacks jurisdiction to consider it now. In fact, however, the constitutional issue was presented in the trial court; was decided adversely to petitioner there; was preserved in the

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1/ References are to the appendix to the Petition for a Writ of Certiorari. Purporting to correct petitioner's counsel, the trial court stated that under Witherspoon it had "a duty to excuse" the juror, and further stated that to rule with petitioner it would have to "disregard" Witherspoon. Yet as this Court had recently emphasized, "it is clear beyond peradventure that Witherspoon is not a ground for challenging any prospective juror." Adams v. Texas, 448 U.S. 38, 47-48 (1980).

direct appeal to the Georgia Supreme Court; and was implicitly decided against petitioner there too. Petitioner can affirmatively demonstrate that even though the highest state court was silent on the federal question, that question was nonetheless properly presented and necessarily decided. Street v. New York, 394 U.S. 576, 581-582 (1969).

To begin with, at the trial level petitioner's counsel made a timely objection on Sixth and Fourteenth Amendment grounds to the Court's exclusion of the juror who had conscientious scruples against the death penalty.[2/] This objection was expressly overruled. Counsel subsequently did not, it is true, include this issue in his appellate brief to the Georgia Supreme Court as an enumeration of error. The issue was preserved and presented to the appellate court nonetheless, by operation of law. For under the Unified Appeal Procedure applicable to all death penalty cases brought in Georgia since August 25, 1980, the Georgia Supreme Court reviews "each of the assertions of error timely raised by the defendant during the proceedings in the trial court regardless of whether or not an

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2/ App. 16a (asking trial court to disregard its view of Witherspoon because "constitutionally the defendant is still entitled to representative jurors of a cross section of society"). This was a specific and unambiguous reference to petitioner's Sixth and Fourteenth Amendment right to jurors impartially drawn from a representative cross-section of the community, Taylor v. Louisiana, 419 U.S. 522, 528 (1976), and to the correlative right, recognized in Witherspoon and Adams, not to have death-scrupled jurors unfairly excluded in a capital case. More precision than petitioner's court-appointed counsel mustered is not demanded. Cf. Braniff Airways v. Nebraska State Board, 347 U.S. 590, 598-599 (1954); New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 67 (1928).

assertion of error was presented to the trial court by motion for new trial, and regardless of whether error is enumerated in the [Georgia] Supreme Court."[3] This provision was added for petitioner's protection, and he was entitled to rely on it. The State does not now contend that the Georgia Supreme Court ignored this obligation to petitioner, nor could it. For in its opinion the court expressly stated:

> As provided for by the Unified Appeal Procedure, we have reviewed independently the record and transcript and find no significant potential of error other than those enumerated by the appellant.

App. 6a-7a. Thus the Georgia Supreme Court confirmed that it had considered and rejected petitioner's constitutional challenge to the juror exclusion at his trial.[4]

Petitioner therefore respectfully submits that there should be no doubt about his compliance with this Court's jurisdictional requirements. If, however, any doubt does remain, petitioner would request the Court to grant a continuance in its consideration of the petition pending an application to the Georgia Supreme Court for a certificate stating whether the federal question was raised and decided on its merits. Allenberg Cotton Co. v. Pittman, 414 U.S. 1109 (1973); Lynumn v. Illinois, 368 U.S. 908 (1961).

3/ Unified Appeal Procedure, Part IV(B)(2), Appendix to Ga. Code Ann. Chapter 27-25 (following Section 27-2538) (Supp. 1981) (emphasis added).

4/ It is not surprising that the court did not discuss the question in its opinion, for it had already dealt with it in a number of previously published opinions. E.g., Cobb v. State, 244 Ga. 344, 260 S.E.2d 60, 66 (1979); Potts v. State, 241 Ga. 67, 243 S.E. 2d 510, 514-515 (1978).

See Stern and Gressman, Supreme Court Practice §3.29 (5th ed. 1978). The Georgia rules clearly permit this procedure to be followd. Ga. Code Ann. §24-4536 Rule 36.

CONCLUSION

Petitioner respectfully submits that the important federal question presented by the petition for a writ of certiorari was raised in each court below and was decided on its merits adversely to petitioner by each court below; and that therefore this Court should grant the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, STEPHEN H. GLICKMAN, a member of the Bar of this Court, do hereby certify that I have served a true and correct copy of petitioner's foregoing Reply to Respondent's Brief in Opposition upon the respondent this 30th day of August, 1982, by depositing a copy of the same in the United States Mail, with proper address and adequate postage to:

John C. Walden, Esq.
132 State Judicial Building
40 Capitol Square, S.W.
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Stephen H. Glickman